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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Indiana High School Athletic Association, Inc. and Robert B. Gardner, Commissioner of the Indiana High School Athletic Association, Inc.,
Petitioners

v.

Eric Washington and Central Catholic High School,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Similar to all other high school athletic associations across the country, the Indiana High School Athletic Association has a semester rule, which, in its case, limits a student's interscholastic athletic eligibility to the first eight semesters following the student's commencement of the ninth grade. The Seventh Circuit held that this eight-semester rule violates Title II of the Americans with Disabilities Act ("ADA") as applied to Eric Washington, who quit school for a semester and a half because of learning disabilities, and who now requests a ninth semester of eligibility. The rule is neutral on its face and is not alleged to rest on a discriminatory motive.

The Seventh Circuit focused on Washington, the person challenging the rule, and held that, under Title II of the ADA, the test for determining whether a person is a "qualified individual" and whether waiving an eligibility rule is a reasonable modification requires a court to determine simply whether waiver of the rule in the particular case would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change. To the contrary, the Sixth Circuit and Eighth Circuit focused on the eligibility rule being challenged and held that the initial inquiry should determine whether the eligibility rule is essential, and, if the rule is essential, then whether waiver would constitute a fundamental alteration in the nature of the program itself or whether waiver would impose undue financial or administrative burdens, without ever addressing whether waiver of the rule in the particular case would be at odds with the purposes behind the rule.

The question presented is whether the Seventh Circuit - in conflict with the decisions of the Sixth Circuit and Eighth

QUESTION PRESENTED - Continued

Circuit - applied the correct test under Title II of the ADA for determining whether a person is a "qualified individual" and whether waiving an eligibility rule is a reasonable modification.

LIST OF PARTIES

Petitioners are Indiana High School Athletic Association, Inc. and Robert B. Gardner, Commissioner of the Indiana High School Athletic Association, Inc. and Respondents are Eric Washington and Central Catholic High School.

Petitioner, Indiana High School Athletic Association, Inc., has no parent companies, subsidiaries, or affiliates.

Respondent, Central Catholic High School, has no parent companies, subsidiaries, or affiliates.

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PETITION FOR A WRIT OF CERTIORARI

The Indiana High School Athletic Association, Inc. and Robert B. Gardner, Commissioner of the Indiana High School Athletic Association, Inc., petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit opinion is reported at 181 F.3d 840 and reprinted in the appendix hereto ("App.") at 1a. The District Court opinion is unreported and reprinted at App. 32a.

JURISDICTION

The judgment of the Court of Appeals was filed on June 23, 1999. (App. 1a.) Jurisdiction exists under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title II of the Americans with Disabilities Act provides:

> "Subject to the provisions of this sub-chapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to

discrimination by any such entity."

STATEMENT OF THE CASE

The Indiana High School Athletic Association, Inc. ("IHSAA") is a voluntary, not-for-profit corporation, whose members include public and private high schools in the State of Indiana. Its purpose is to encourage, regulate, and give direction to wholesome, amateur, interschool athletic competition between the schools who are members and, since 1903, member schools have adopted rules regarding eligibility and other matters related to inter-scholastic athletic competition. One such rule is the "eight-semester rule."

Under the IHSAA's eight-semester rule, Rule C-12-2, a student's athletic eligibility is limited to the first eight semesters (the first four years of school) following the student's commencement of the ninth grade. (App. 46a.) The rule was adopted, in part, to discourage redshirting,[1] promote competitive equality, protect students' health and safety, create opportunities for younger students, promote the idea that academics are more important than athletics, and encourage student-athletes to graduate in four years. (App. 45-46a.)

Respondents Eric Washington ("Washington") and Central Catholic High School ("Central Catholic") applied to

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[1] Redshirting is the practice of slowing a student's academic pace and postponing his initial participation in competitive athletics in order to permit him to gain physical and athletic maturity before beginning his period of eligibility for competitive athletics. (App. 3a, n. 2.)

the IHSAA for a waiver of the eight-semester rule, to allow Washington a ninth semester of eligibility to play on Central Catholic's basketball team. Even though Washington had neither attended school for all of his eight semesters of eligibility nor played sports until his seventh semester, his eligibility was set to expire.

Because of poor academic performance, in the fall of 1994, Washington was held back to repeat his eighth grade. But, by the end of that first semester, school officials then decided that he might do better if he stayed with his class, and then advanced him to the ninth grade at Lafayette Jefferson High School ("Lafayette Jefferson"). Washington continued to fail academically and eventually withdrew from Lafayette Jefferson in November 1996. After missing the following one and one half semesters, Washington enrolled at Central Catholic. In his first year at Central Catholic, Washington led his team to the 1998 Class A state basketball championship. It was at this time that Washington was diagnosed as learning disabled.

Under the eight-semester rule, because Washington entered the ninth grade during the second semester of the 1994-1995 academic year, he was not eligible to play basketball in the second semester of the 1998-1999 year (nine semesters after he began the ninth grade). Thus, respondents sought a waiver of the eight-semester rule from the IHSAA and argued that Washington should be granted an additional semester of eligibility under either the catastrophic injury rule, Rule C-12-3 (App. 46-47a), or the hardship rule, Rule C-17.8.1 (App. 47-48a). The catastrophic injury rule clearly did not apply because Washington did not withdraw because of injury or illness. The hardship rule allowed the IHSAA to set aside the effect of an eligibility rule if strict enforcement in the particular case would not serve to accomplish the

purpose of the rule, the spirit of the rule had not been violated, and there was a showing that undue hardship would result in the particular case. The IHSAA found, however, that Washington's case did not constitute a hardship, so it denied Washington's application. Washington appealed the denial to the IHSAA Executive Committee, which also denied the request and found that Washington will have used his eight semesters of eligibility as of January 1999, that the partial year he sat out counted toward his eight semesters of eligibility, and that his case did not constitute a hardship. The IHSAA, under IHSAA Commissioner Robert Gardner, had granted an additional semester under the catastrophic injury exception on two previous occasions, but had not waived nor granted a hardship exception to the eight-semester rule, at least not during the previous fourteen years.

Washington and Central Catholic filed a complaint against the IHSAA and its commissioner and requested a preliminary injunction against enforcement of the eight-semester rule on the grounds that the IHSAA's failure to grant him a waiver under the hardship rule amounted to illegal discrimination against him by reason of his learning disability in violation of § 504 of the Rehabilitation Act of 1973 ("§ 504"), 29 U.S.C. § 794(a), and Title II of the Americans with Disabilities Act (1990) ("Title II of the ADA"), 42. U.S.C. § 12132. Jurisdiction was invoked under 28 U.S.C. § 1331.

After determining that Washington would suffer irreparable harm for which he would have no adequate remedy at law if his injunction were denied, the District Court considered whether respondents demonstrated a substantial likelihood of success on the merits with respect to his claims under § 504 and Title II of the ADA. The District Court noted that there are three requirements identical to both

claims: (1) Washington must suffer from a disability; (2) he must be "otherwise qualified" to participate in athletics; and (3) he must demonstrate that he is being excluded from playing basketball by reason of his handicap.

The District Court combined into one inquiry the second and third prongs of the analysis to determine solely whether the requested relief constituted a reasonable modification of the IHSAA's rule. In doing so, the District Court discerned two approaches from the case law - - one focusing on the rule itself, without reference to a particular individual, and whether the rule is generally fundamental and essential, and another focusing on the individual and whether a waiver for the individual would do damage to the purposes behind the rule. The District Court chose to apply the second approach and held that a waiver in Washington's case would be a reasonable modification because there would be no conflict with the purposes behind the eight-semester rule. Accordingly, the District Court granted the injunction after finding a violation of Title II of the ADA,[2] which Petitioners appealed, and the Seventh Circuit affirmed.

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[2] Because Respondents did not show that the IHSAA received Federal funding, the § 504 claim was denied.

After finding that the appeal was not moot,[3] the Seventh Circuit affirmed the entry of the preliminary injunction. Additionally, the Seventh Circuit concluded that the District Court properly inferred that Washington withdrew from school because of his learning disability, when, in fact, the District Court made no such finding.[4]

REASONS FOR GRANTING THE PETITION

This petition for plenary review should be granted because the Seventh Circuit's decision is in direct conflict with decisions of the Sixth Circuit and Eighth Circuit on the same important matter: interpretation under Title II of the ADA of the appropriate test for determining whether a student athlete is a "qualified individual" and whether waiving an essential eligibility rule is a "reasonable modification." *See*, Sup. Ct. R. 10(a); *McElroy v. United States*, 455 U.S. 642, 643 (1982) (certiorari granted because of "a conflict among the Circuits on

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[3] The Seventh Circuit held that the action was not moot because if the injunction is vacated, stayed or reversed, the IHSAA could impose retroactive penalties requiring the forfeiture of victories won by Central Catholic, or require return of individual and team awards earned while Washington participated.

[4] The evidence adduced to the District Court was that prior to withdrawal, Washington was tested and found by Lafayette Jefferson not to be learning disabled, but after his return to school at Central Catholic, he was tested again and diagnosed as learning disabled. Additionally, there was testimony that students with learning disabilities were more likely to quit school.

this issue of statutory construction"); *Marks v. United States*, 430 U.S. 188,189 (1977) (certiorari granted "to resolve a conflict in the Circuits"). Additionally, plenary review ought to be granted because this is an important issue that strikes beyond the interpretation of eligibility rules by these states' high school athletic associations, and significantly impacts all other high school associations, as well as other entities and individuals subject to Title II of the ADA. *Southeastern Community College v. Davis*, 442 U.S. 397, 403 (1979).

1. A Conflict Exists Among The Circuits Requiring Plenary Review.

In order for Washington to receive protection under Title II of the ADA, he must be a "qualified individual," meaning "an individual with a disability, who with or without reasonable modification to the rules, . . . meets the essential eligibility requirements for the . . . participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). Cases interpreting § 504 of the Rehabilitation Act are relevant to a Title II of the ADA analysis because both statutes are to be interpreted consistently, 42 U.S.C. § 12134, and the "remedies, procedures, and rights" under Title II are the same as those provided in § 794(a) of the Rehabilitation Act, 42 U.S.C. § 12133.

Under the Seventh Circuit's analysis, the test for determining whether a person like Washington is a "qualified individual" is whether "waiver of the rule in the particular case at hand would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change." (App. 22a.) In applying its test, the Seventh Circuit conducted an initial individual inquiry into the general purposes behind the eight-semester rule as it applied to Washington and concluded that waiver would not violate the general purposes behind the rule so that waiver of the rule was a reasonable modification. (App. 27-29a.)

The Seventh Circuit's individual inquiry analysis is in direct contrast to the decisions of the Sixth Circuit and Eighth Circuit, which, not surprisingly, reached opposite conclusions. *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994), *reh'g and sugg. for reh'g en banc denied; Sandison v. Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026 (6th

Cir. 1995); *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453 (6th Cir. 1997) (*on reh'g en banc*).

In the Eighth Circuit's *Pottgen* case, suit was filed by a student against the Missouri State High School Activities Association ("MSHSAA") for an injunction to restrain the MSHSAA from enforcing its age eligibility rule, which declared Pottgen ineligible for interscholastic sports because he turned nineteen shortly before his senior year. After repeating two grades in elementary school, Pottgen was diagnosed as learning disabled. The MSHSAA denied Pottgen's request for a hardship exception and Pottgen brought suit, alleging that application of the age eligibility rule in his case constituted illegal discrimination under § 504 and Title II of the ADA. The District Court enjoined the MSHSAA from preventing Pottgen from competing in baseball. The Eighth Circuit reversed, holding that the District Court erred by granting the injunction based upon both Pottgen's Rehabilitation Act claim and his Title II of the ADA claim. *Pottgen*, 40 F.3d at 930, 931.

The Eighth Circuit began it analysis by determining first whether Pottgen was an "otherwise qualified individual" under § 504. Specifically, § 504 states that "no otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The Eighth Circuit looked to *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979), where this Court defined an "otherwise qualified individual" as "one who is able to meet all of the program's requirements in spite of his handicap." However, the Eighth Circuit noted that the *Davis* test did not apply to all requirements, rather "individuals with disabilities

need only meet the program's necessary or essential requirements." *Pottgen*, 40 F.3d at 929.

Similar to the Seventh Circuit's analysis in Washington's case, the District Court found Pottgen to be an "otherwise qualified" individual because, except for the eligibility rule, Pottgen met all the MSHSAA's eligibility requirements. The Eighth Circuit rejected this analysis stating "we disagree" with the District Court's decision to frame the issue, not as whether Pottgen meets all the eligibility requirements, but as whether reasonable accommodations exist. *Id.* Rather, the Eighth Circuit concluded that "a Rehabilitation Act analysis requires a court to determine both whether an individual meets all of the essential eligibility requirements *and* whether reasonable modifications exist." *Id.* Pottgen could not in fact meet all of the baseball program's requirements in spite of his disability because he was simply too old to meet the MSHSAA's age limit. *Id.*

The Eighth Circuit then stated that even though Pottgen cannot meet the "essential" eligibility requirement of being under nineteen, he could still be "otherwise qualified" if reasonable accommodations would enable him to meet the age limit. *Id.*, *citing School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n. 17 (1987). However, and as the Eighth Circuit explained, "reasonable accommodations do not require an institution 'to lower or to effect substantial modifications of standards to accommodate a handicapped person,'" *Pottgen*, 40 F.3d at 930; *quoting Davis*, 442 U.S. at 413,and "accommodations are not reasonable if they impose 'undue financial and administrative burdens' or if they require 'fundamental alteration in the nature of [the] program,'" *Pottgen*, 40 F.3d at 930; *quoting Arline*, 480 U.S. at 287 n. 17. Since Pottgen was already older than the MSHSAA's age limit, the only possible accommodation would be to waive

the essential eligibility requirement itself, which the Eighth Circuit refused:

> Although Pottgen contends an age limit waiver is a reasonable accommodation based on his disability, we disagree. Waiving an essential eligibility standard would constitute a fundamental alteration in the nature of the baseball program. Other than waiving the age limit, no manner, method, or means is available which would permit Pottgen to satisfy the age limit. Consequently, no reasonable accommodations exist.

Pottgen, 40 F.3d at 930. Accordingly, the Eighth Circuit held that "[s]ince Pottgen can never meet the essential eligibility requirement [of being under the age of nineteen] he is not an 'otherwise qualified' individual." *Id.*

The Eighth Circuit also examined Pottgen's claim under Title II of the ADA. *Id.* The ADA defines a "qualified individual with a disability" as meaning "an individual with a disability, who, with or without reasonable modifications to rules, policies or practices . . . meets the essential eligibility requirements for the . . . participation in programs or activities provided by a public entity." *Id.*; *citing* 42 U.S.C. § 12131(2).

The Eighth Circuit also rejected the individual inquiry analysis under Title II of the ADA for the same basic reasons it rejected it under its § 504 analysis:

> Such an individualized inquiry is inappropriate at this stage. Instead, to determine whether Pottgen is a "qualified individual" under the

> ADA, we must first determine whether the age limit is an essential eligibility requirement by reviewing the importance of the requirement to the inter-scholastic baseball program. If this requirement is essential, we must then determine whether Pottgen meets this requirement with or without modification. It is at this latter stage that the ADA requires an individualized inquiry.

Pottgen, 40 F.3d at 930-931. Additionally, the Eighth Circuit stated:

> We think this is not required, and for good reason. A public entity could never know the outer boundaries of its "services, programs or activities." A requirement could be deemed essential for one person with a disability but immaterial for another similarly, but not identically, situated individual.

Id. at 931.

The Eighth Circuit further rejected the individual inquiry as a first step of a Title II of the ADA analysis because such an inquiry would compel the MSHSAA to establish a fact-finding mechanism for each individual seeking to attack a program requirement, thus, forcing the MSHSAA to show the essential nature of each allegedly offending program requirement as it applies to the complaining individual. *Id.* Such an obligation would impose an immense administrative burden on MSHSAA requiring thorough evidentiary hearings at each stage of the process. *Id.*

Finally, the Eighth Circuit rejected the initial individual inquiry analysis because the ADA imposes no such duty; "such an approach flies in the face of the *Arline* Court's statement that '[a]ccommodation is not reasonable if it either imposes 'undue financial and administrative burdens' [on the public entity] or requires 'a fundamental alteration in the nature of [the] program.'" *Id.*; *quoting Arline*, 480 U.S. at 287 n. 17.

In *Sandison*, the Sixth Circuit also rejected the approach adopted by the Seventh Circuit. Sandison and another student filed suit against their high schools and the Michigan High School Activities Association ("MHSAA") and alleged that the application of the MHSAA's age rule, which prohibited them from eligibility because they had turned nineteen, illegally discriminated against them by reason of their learning disabilities in violation of § 504 and Title II of the ADA. The District Court granted the students' request for an injunction to permit them to participate in cross-country and track. Both students suffered from learning disabilities that caused them to fall behind the typical school grade for children of their age.

Much like the Seventh Circuit's analysis in Washington's case, the District Court in *Sandison* concluded that the students were "otherwise qualified" under the statutes because permitting them to participate would not thwart the purposes of the age rule, which the District Court characterized as intending to safeguard athletes against injuries arising from competition against overage, and thus oversized athletes, and to prevent overage athletes from gaining an unfair competitive advantage. Additionally, the District Court found that a waiver of the age limit for these students was a "reasonable accommodation" because they competed in noncontact sports and were not "'star' players." *Sandison*, 64 F.3d at 1029.

The Sixth Circuit reversed the District Court's decision, which granted the preliminary injunction, after the court found no chance of success on the merits. *Id.* at 1037. The Sixth Circuit initially examined the "solely by reason of disability" language of § 504 and this Court's decision in *Davis*. Based upon the holding in *Davis*, the Court reasoned that § 504 does not require "affirmative action," *Davis, 442 U.S.* at 410, nor "substantial changes," *id.* at 411, n. 10, such as a "fundamental alteration in the nature of the program" or changes "imposing undue financial and administrative burdens," *id.* at 410, 412, rather, § 504 demands "even handed treatment of qualified, handicapped persons," *id.* at 410. Thus, following *Davis* and *Wimberly v. Labor and Industrial Relations Commission of Missouri*, 479 U.S. 511 (1997), wherein this Court held that state law did not violate § 504 when it denied unemployment benefits to a person who left her job due to her pregnancy, the Sixth Circuit held:

> Similarly, under a "natural reading" of section 504, the MHSAA's disqualification of students who reach 19 years of age by the specified date "cannot readily be characterized as a decision made," *id.* at 517, . . . "solely by reason of" each student's respective learning disability.

Sandison, 64 F.3d at 1032.

The Sixth Circuit then examined the "otherwise qualified" language under § 504, held that the District Court clearly erred, and found the District Court's observations that the students were not "star" players and not an injury risk to other competitors irrelevant. *Sandison*, 64 F.3d at 1034. Instead, the Sixth Circuit's analysis began with the definition of a disabled individual as meaning an individual "otherwise

qualified to participate in a program if, with 'reasonable accommodation,' the individual can meet the 'necessary' requirements of the program." *Id.* Aside from the necessity of the program's requirement, the only other question is "whether some reasonable accommodation is available to satisfy the legitimate interests of both the grantee and the handicapped person," *id.*, and as stated in *Arline,* an accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on a grantee or requires "a fundamental alteration in the nature of the program," *id.*; *quoting Arline*, 480 U.S. at 287 n. 17.

The Sixth Circuit specifically stated that its analysis was in conformity with *Pottgen*:

> We join the only other circuit that has decided the "otherwise qualified" question on similar facts and hold that the MHSAA's age regulation is "necessary" and that waiver of the regulation is not a "reasonable accommodation."

Sandison, 64 F.3d at 1034.

The Sixth Circuit followed the Eighth Circuit's rejection of waiver as a reasonable accommodation, because it would constitute a fundamental alteration," *id.* at 1034-1035, found that "the age restriction was a necessary requirement of the interscholastic sports program," *and* concluded that the imposition of a fact finding individual inquiry would pose an unreasonable administrative burden upon the MHSAA, *id.* at 1035. Specifically, with respect to the unreasonable burden, the Sixth Circuit stated:

> . . . although the plaintiffs asserted that introducing their average athletic skills into

> track and cross-country competition would not fundamentally alter the program, the record does not reveal how the MHSAA, or anyone, can make that competitive unfairness determination without an undue burden. The MHSAA's expert explained that five factors weigh in deciding whether an athlete possessed an unfair competitive advantage due to age: chronological age, physical maturity, athletic experience, athletic skill level, and mental ability to process sports strategy. It is plainly an undue burden to require high school coaches and hired physicians to determine whether these factors render a student's age an unfair competitive advantage. The determination would have to be made relative to the skill level of each participating member of opposing teams and the team as a unit. And of course each team member and the team as a unit would present a different skill level. Indeed, the determination would also have to be made relative to the skill level of the would-be athlete whom the older student displaced from the team. It is unreasonable to call upon coaches and physicians to make these near-impossible determinations.

Id.

Moreover, the Sixth Circuit explained that there is a "significant peculiarity" in trying to characterize a waiver of the age restriction as a reasonable accommodation because ordinarily an accommodation of an individual's disability operates so that the disability is overcome and the disability no longer prevents the individual from participating, whereas a

waiver of the age restriction "is not directed at helping them overcome learning disabilities; the waiver merely removes the age ceiling as an obstacle." *Id.* Thus, the Sixth Circuit held that the students were excluded from participation "solely by reason of" age, not disability and, furthermore, waiver of the "necessary" age restriction does not constitute a reasonable accommodation." *Id.*

The Sixth Circuit also examined the ADA claim and noted that "a plaintiff proceeding under Title II of the ADA must, similar to a section 504 plaintiff, prove that exclusion was 'solely by reason of [disability].'" *Sandison*, 64 F.3d at 1036. The Sixth Circuit held that even under Title II of the ADA, the students "were excluded by reason of age, not disability," because "absent their respective learning disability, the plaintiffs still would not meet the age restriction." *Id.* The Sixth Circuit then held that the students were not "qualified individuals" under Title II, again based upon the *Pottgen* analysis. *Id.* at 1036-1037.

In *McPherson*, the Sixth Circuit followed the Eighth Circuit and *Sandison* in an eight-semester case. Dion McPherson filed suit against the Michigan High School Athletic Association ("MHSAA") requesting a preliminary injunction forbidding the MHSAA from enforcing its eight-semester eligibility rule[5] against him and invoking any penalty against his high school. McPherson repeated his eleventh grade, which represented his seventh and eighth semesters in high school. It

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The MHSAA's eight semester rule differs slightly from the IHSAA's rule because it only counts enrolled semesters, whereas the IHSAA's rule counts all semesters regardless of whether the student is enrolled.

was during his repeat of the eleventh grade that he participated in varsity basketball for the first time because before that time he was academically ineligible. McPherson was then diagnosed as learning disabled. McPherson wanted to play basketball and alleged that application of the eight-semester rule constituted illegal discrimination against him by reason of his learning disability in violation of both § 504 and Title II of the ADA. The District Court granted the injunction and the Sixth Circuit reversed. *McPherson*, 119 F.3d at 455.

The Sixth Circuit explained that under § 504 and Title II of the ADA there are two methods that would allow McPherson to prove that the MHSAA's actions "were taken *because* of his disability: either (1) by offering evidence that learning disabilities were actually considered by the MHSAA in formulating or implementing the eight-semester rule, or (2) by showing that the MHSAA could have reasonably accommodated his disability, but refused to do so." *McPherson*, 119 F.3d at 460. The Sixth Circuit quickly ruled out the first method of proof. Thus, McPherson's claim depended upon a showing that the MHSAA could have reasonably accommodated him, but refused. *Id.* at 461.

Significantly, the Sixth Circuit skipped the first step of the analysis of *Pottgen* and *Sandison*, of whether McPherson was otherwise qualified, presumably because his eight semesters of eligibility had obviously expired. Instead, the Sixth Circuit addressed McPherson's argument that the eight-semester rule cannot be considered "necessary" because the MHSAA was allowed to, and had, granted waivers under the eight-semester rule, while under the MHSAA rules waiver of the age rule was prohibited. The Sixth Circuit quickly dismissed McPherson's argument because at no time in *Sandison* did it rely upon the fact that the age rule was "non-waivable" in order to conclude that the rule was necessary.

McPherson. 119 F.3d at 461. Moreover, the Sixth Circuit explained that just because "a rule may sometimes be waived under some circumstances, does not mean that the rule, as a general matter, is not 'necessary' to the successful function of a sports program." *Id.*

With respect to the necessity of the rule, testimony in support of the rule included that "the eight semester rule creates a fair sense of competition by limiting the level of athletic experience and skill of players to create a more level playing field for the competitors." *Id.* at 456. Further, "the absence of the rule would lead, as it has in other states, to red-shirting of players, in which a player is deliberately held back for a year in order to allow the student to gain greater physical and athletic maturity, leading in turn, presumably, to greater athletic ability." *Id.* Accordingly, the Sixth Circuit found "no principled distinction between the nature and purpose of the age-limit rule and the eight-semester rule that could lead us to conclude that the former is 'necessary' while the latter is not." *Id.* In fact, the Sixth Circuit found that the purposes served by the two rules were largely the same:

> . . . both are intended to limit the level of athletic experience in range of skills of the players in order to create a more even playing field for the competitors, to limit the size and physical maturity of high school athletes for the safety of all participants, and to afford the players who observe the age limit rule and the eight semester rule, presumably athletes of less maturity, a fair opportunity to compete for playing time. In addition, the MHSAA here produced evidence that the absence of an eight semester rule could lead to widespread red-shirting abuses, and that the rule was "essential

> to preserving the philosophy that students attend school primarily for the classroom education and only secondarily to participate in inter-scholastic athletics." The considerations satisfy us that the eight semester rule is a necessary one to the sports programs, including basketball, regulated by the MHSAA.

Id. at 461-462.

After concluding that the eight-semester rule was necessary, the Sixth Circuit looked to whether a waiver could constitute a reasonable accommodation, *id.* at 462, and "whether requiring the MHSAA to grant a waiver would 'impose[] undue financial and administrative burdens . . . , or require[] a fundamental alteration in the nature of [the] program,'" *id.* at 461; *citing Sandison*, 64 F.3d at 1034; *quoting Arline*, 480 U.S. at 287, n. 17. The Sixth Circuit not only concluded that a waiver of the eight-semester rule for McPherson "would work a fundamental alteration in Michigan high school sports programs," but "requiring a waiver under these circumstances would impose an immense financial and administrative burden on the MHSAA, by forcing it to make 'near-impossible determinations' about a particular student's physical and athletic maturity." *McPherson*, 119 F.3d at 461.

The Sixth Circuit also rejected the argument that because the MHSAA allowed waivers under some circumstances, granting McPherson a waiver would not be unduly burdensome:

> Plaintiff would have us require waivers for all learning-disabled students who remain in school more than eight semesters. That, of course, would have the potential of opening flood gates for waivers, while until now, there have been

> only a handful of cases deemed appropriate for waivers. Assessing one or two students pales in comparison to the task of assessing a large number of students; an increase in number will both increase the costs of making the assessments, as well as increasing the importance of doing so correctly. Having one student who is unfairly advantaged may be problematic, but having increasing numbers of such students obviously runs the risk of irrevocably altering the nature of high-school sports.

Id. at 462-463.

Hence, the conflict between the circuits is clear. Both the Eighth Circuit in an age rule case and Sixth Circuit in an age rule case and an eight-semester rule case followed a reasoned analysis of determining: (1) whether the student would be "otherwise qualified," with or without the modification; (2) whether the eligibility rule requested to be waived is an "essential" or "necessary" rule; and, if so, (3) whether wavier of the rule would require "a fundamental alteration in the nature of the program" or "impose undue financial or administrative burdens on the high school athletic association." Had the Seventh Circuit followed this approach, it would have reversed the District Court's entry of the injunction against the IHSAA as an abuse of discretion. Clearly, Washington's eight semesters of eligibility had expired so that he was not "otherwise qualified." Second, as noted in *McPherson*, the eight-semester rule is a necessary and an essential eligibility rule, adopted, in part, to discourage redshirting, promote competitive equality, protect students' health and safety, create opportunities for younger students, promote academics over athletics, and encourage student-athletes to graduate in four years. Third, waiver of the

eight-semester rule on a case-by-case, fact-finding inquiry would impose an immense administrative, and thus financial, burden upon the IHSAA, as noted in *Sandison* and *McPherson*. Accordingly, waiver of the eight-semester rule as to Washington was not a reasonable modification. Thus, there is a direct conflict between the decisions of the Sixth Circuit and Eighth Circuit versus the Seventh Circuit.[6]

This important issue of the proper test to be used in interpreting eligibility rules in the context of Title II of the ADA requires plenary review to resolve the conflict between the decisions of the circuits.

2. The Appropriate Test To Be Used For A Title II ADA Analysis Is An Important Issue That Requires Interpretation By This Court.

Under the precedent established by the Seventh Circuit, high school athletic associations and their disabled student-athletes in Indiana, Illinois and Wisconsin, will now be treated differently than those in the Eighth Circuit's states of North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri, and Arkansas, and the Sixth Circuit's states of Michigan, Ohio, Kentucky, and Tennessee. The eligibility rules of state high school athletic associations affected 6,504,295 student-athletes,

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[6] The Seventh Circuit attempted to reconcile its decision with *McPherson* in a footnote, n. 13, App. 22-24a, where it discussed the individual inquiry analysis, however, this was after the Sixth Circuit reached its conclusion that waiver was not a reasonable modification, and this individual inquiry analysis was discussed in the context of the administrative burdens.

including the disabled, across all sports in the 1998-1999 school year.[7] In Indiana alone, there were 159,252 student-athletes across all sports,[8] and, according to estimates, approximately 14.73 percent of those students-athletes were students with disabilities receiving services.[9] More importantly, as noted in the District Court's opinion, the question of the appropriate test to be used for a Title II of the ADA or § 504 analysis for student athletes has been litigated in several states: those involving challenges to the eight-semester rule, including Michigan, *McPherson* (application of eight-semester rule valid); Oregon, *Bingham v. Or. Sch. Activities Ass'n.*, 24 F. Supp. 2d 1110, (D. Or. 1998) (application of eight-semester rule invalid); and Ohio, *Rhodes v. Ohio High Sch. Athletic Ass'n.*, 939 F. Supp. 584 (N.D. 0h. 1996) (application of eight-semester rule valid), and those involving challenges to the age limit rule, including Michigan, *Sandison* (application of age rule valid); Missouri,

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Information obtained from the National Federation of State High School Association's web site, ***www.nfhs.org***, "High School Athletics Reaches All-Time High."

8
Information obtained from the National Federation of State High School Association's web site, ***www.nfhs.org***, "High School Activities Participation Survey," totals for Indiana.

9
Indiana Department of Education, Division of Special Education, 1998-1999 Special Education Statistical Report (stating percentage of all Indiana students with disabilities receiving services), filed pursuant to Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12406, 12469 (1999), to be codified at 34 C.F.R. pt. 300.752.

Pottgen (application of age rule valid); Florida, *Johnson v. Fla. High Sch. Activities Ass'n., Inc.*, 899 F. Supp. 579 (N.D. Fla. 1996) (application of age rule invalid), *vacated as moot*, 102 F.3d 1172 (1997); Connecticut, *Dennin v. Conn. Inter-Scholastic Athletic Conf., Inc.*, 913 F. Supp. 663 (D. Conn. 1996) (application of age rule invalid), *vacated as moot*, 94 F.3d 96 (1996); *Beatty v. Pa. Interscholastic Athletic Ass'n.*, 24 Indiv. with Disabilities Educ. Law Rep. 1146 (W.D. Pa. 1996) (application of age rule valid); and *Reaves v. Mills*, 904 F. Supp. 120 (W.D.N.Y 1995) (application of age rule valid). Moreover, NCAA eligibility rules have been challenged under § 504 of the Rehabilitation Act in *Ganden v. National Collegiate Athletic Ass'n.*, 1996 W.L. 680000 (N.D. Ill. Nov. 21, 1996). Thus, the interpretation of Title II of the ADA as it applies to eligibility rules is an important area of law to all entities that have eligibility rules and the individuals challenging those rules such that it deserves this Court's plenary review.

CONCLUSION

This Petition for a Writ of Certiorari should be granted because the Seventh Circuit's Title II of the ADA analysis of whether waiver of an essential eligibility requirement constitutes a reasonable modification is in direct conflict with decisions of the Sixth Circuit and Eighth Circuit. Moreover, this is an important issue to all entities and individuals affected by Title II of the ADA.

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED JUNE 23, 1999

In the
United States Court of Appeals
For the Seventh Circuit

No. 99-1003

ERIC WASHINGTON and
CENTRAL CATHOLIC HIGH SCHOOL,

Plaintiffs-Appellees,

v.

INDIANA HIGH SCHOOL ATHLETIC ASSOCIATION, INCORPORATED and ROBERT B. GARDNER, Commissioner of the Indiana High School Athletic Association, Incorporated,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division
No. 98 C 58 — Allen Sharp, Judge.

Argued February 22, 1999 — Decided June 23, 1999

Before BAUER, RIPPLE and DIANE P. WOOD, Circuit Judges.

Appendix A

RIPPLE, Circuit Judge. Eric Washington and Central Catholic High School obtained a preliminary injunction in the district court enjoining the Indiana High School Athletic Association ("IHSAA") from denying Mr. Washington athletic eligibility for the second semester of the 1998-99 school year. The IHSAA appeals. We affirm the district court's decision to grant the preliminary injunction.[1]

I

BACKGROUND

A. Facts

Mr. Washington is a learning disabled student at Central Catholic High School ("Central Catholic") in Lafayette, Indiana. Throughout elementary school, he had been allowed to advance to the next grade despite academic insufficiency. He was held back, however, in the eighth grade. During the first semester of the 1994-95 academic year, while he was repeating the eighth grade, he continued to receive failing grades. School officials then decided that he might do better if he stayed with his class, and they therefore advanced him to the ninth grade at Lafayette Jefferson High School at the beginning of the second semester during the 1994-95 academic year. In this new environment, Mr. Washington continued to fail during that semester and throughout the following academic year. Early in the 1996-97 academic year, a school counselor suggested that Mr. Washington drop out of high school. Mr. Washington took that advice.

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1. We have appellate jurisdiction over this appeal. See 28 U.S.C. sec. 1292(a)(1).

Appendix A

In the summer of 1997, Mr. Washington participated in a three-on-three basketball tournament sponsored by Central Catholic. At the tournament, Mr. Washington met the coach of the Central Catholic basketball team, Chad Dunwoody. Mr. Dunwoody was also a teacher at the school. After conversations with Dunwoody, Mr. Washington decided to attend Central Catholic. Mr. Washington entered school and began playing basketball. Mr. Dunwoody, who also became Mr. Washington's academic mentor at Central Catholic, suggested that Mr. Washington be tested for learning disabilities. Although Mr. Washington had previously been tested and found not to be learning disabled, a January 1998 test indicated that he was in fact learning disabled.

The IHSAA has a rule that limits a student's athletic eligibility to the first eight semesters following the student's commencement of the ninth grade ("the eight semester rule"). The purposes of that rule, according to the IHSAA, include discouraging redshirting,[2] promoting competitive equality, protecting students' safety, creating opportunities for younger students and promoting the idea that academics are more important than athletics. Under the rule in question, because Mr. Washington entered the ninth grade during the second semester of the 1994-95 academic year, he would no longer be eligible to play basketball in the second semester of the 1998-99 year (nine semesters after he began the ninth grade).

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2. Redshirting is the practice of slowing a student's academic pace and postponing his initial participation in competitive athletics in order to permit him to gain physical and athletic maturity before beginning his period of eligibility for competitive athletics.

Appendix A

Central Catholic applied for a waiver of the eight semester rule for Mr. Washington. It requested that the IHSAA not count the semesters that he was not enrolled in any high school for purposes of eligibility under the eight semester rule. It requested a waiver under IHSAA Rule C-12-3, which allows an exemption "if a student is injured which necessitates the student's complete withdrawal from the school or prohibits enrollment in the school for that semester, and the student does not receive any academic credit for that semester." R.15, Ex.5. Central Catholic also requested a waiver under IHSAA Rule 17-8, referred to by the parties as "the hardship rule." That rule allows the IHSAA not to enforce a rule if strict enforcement in the particular case would not serve to accomplish the purpose of the rule, the spirit of the rule would not be violated, and there is a showing of undue hardship in the particular case. Even though it had granted waivers for physical injuries in the past, the IHSAA denied Mr. Washington's application. Mr. Washington appealed the denial to the IHSAA Executive Committee, which denied the appeal.

Mr. Washington will be ineligible to play high school basketball during the 1999-2000 school year because his participation will violate another eligibility rule that limits the maximum age at which a student athlete may compete ("the age limit rule"). No challenge is made to that rule in this lawsuit. Rather, the focus is exclusively on the eight semester rule; it is challenged on the ground that failure to grant a waiver of the eight semester rule in this case violates Title II of the Americans with Disabilities Act, 42 U.S.C. sec. 12132.

Appendix A

B. The District Court's Order

The district court granted a preliminary injunction against the enforcement of the Rule against Mr. Washington.

The court first addressed the issue of irreparable harm and stated:

> This court has no difficulty determining that this plaintiff will suffer irreparable harm for which he has no adequate remedy at law if this injunction is denied. The loss of the remainder of the basketball season, and with that, most likely the loss of any future playing opportunities and the loss of the desire to continue academically, are harms which cannot be repaired, for which Eric cannot be adequately compensated.

R.17 at 4.

The court next considered whether the plaintiffs had demonstrated a substantial likelihood of success on the merits with respect to its claims under sec. 504 of the Rehabilitation Act, 29 U.S.C. sec. 794(a),[3] and Title II of the Americans with Disabilities Act, 42 U.S.C. sec. 12132. The court then noted that there are three requirements that are identical to

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3. The court subsequently determined that Mr. Washington could not premise his claim on the Rehabilitation Act because he had failed to establish that the IHSAA received federal financial assistance. The court held, however, that the case could proceed under the ADA. The IHSAA does not dispute that the provisions of Title II of the ADA apply.

both claims: (1) Mr. Washington must suffer from a disability, (2) he must be "otherwise qualified" to participate in athletics, and (3) he must demonstrate that he is being excluded from playing basketball by reason of his handicap.

The first of these prongs was not at issue. The IHSAA did not dispute that Mr. Washington suffers from a disability.[4] Addressing the second and third prongs together, the district court took the view that they combine into an inquiry of whether the requested relief constitutes a reasonable modification of the IHSAA's rule. The district court then discerned two approaches to this issue in the case law — one focusing on whether the rule itself, without reference to a particular individual, is generally fundamental and essential, and another focusing on whether the individual waiver requested would do damage to the purposes behind the rule. Choosing to apply the second approach, the court held that waiver of the rule in Mr. Washington's case would be a reasonable modification because there would be no conflict with the purposes behind the eight semester rule. The court pointed out that there was no redshirting in this instance and that, to the extent that the Rule was intended to emphasize the primacy of academics, the record supported the conclusion that Mr. Washington's participation in the athletic program had increased his self-esteem and, consequently, his academic achievement. Safety and competitive equality concerns, continued the court, were adequately addressed by the age rule that still applied to Mr. Washington.

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4. The IHSAA attempted to raise this issue during oral argument. However, it did not raise the issue in its brief in this court; the issue is therefore waived.

After holding that the plaintiffs had established a substantial likelihood of success on the merits, the court then held that the potential harm to the IHSAA would be insignificant if the preliminary injunction were granted. It rejected the IHSAA's argument that the IHSAA would be flooded with cases; Mr. Washington was the first student with a learning disability in at least fourteen years to bring such a waiver request. The court also believed that the fact that another student would be displaced by Mr. Washington's presence on the basketball team did "not over-balance the scale against the well-documented harm to Eric if his eligibility is terminated." R.17. Moreover, the court noted that the public's interest in maintaining a level field of competition would not be overly affected.

Subsequent to the district court's decision granting the motion for preliminary injunction, Mr. Washington's basketball season ended.

II

DISCUSSION

A.

Although neither party has briefed the issue whether the completion of Mr. Washington's basketball season renders moot all issues in the lawsuit, we must address this issue because it is jurisdictional. See Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1012, 1020-21 (1998). There must be an actual controversy at all stages of this court's review. See United States Parole Comm'n v. Geraghty, 445

U.S. 388, 397 (1980); Jordan v. Indiana High Sch. Athletic Ass'n, 16 F.3d 785, 787 (7th Cir. 1994).

We hold that an actual controversy still exists despite the end of the basketball season because Central Catholic is still a party to the litigation.[5] Under IHSAA Rule 17-6:

> [The IHSAA may] impose retroactive penalties on student athletes (and their schools) who are declared ineligible by the IHSAA but are permitted to participate in interschool competition in accordance with a court restraining order or injunction. If the injunction is subsequently vacated, stayed or reversed, the IHSAA may strike individual and team records, require forfeit of victories won by the team, or require return of individual and team awards earned while the student participated.

Crane v. Indiana High Sch. Athletic Ass'n, 975 F.2d 1315, 1318 (7th Cir. 1992). In Crane, noting that the student could

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5. We note that, after the district court enjoined the IHSAA from declaring Mr. Washington ineligible, Central Catholic filed a motion to dismiss itself from the lawsuit because it was "merely a nominal party." R.26. However, Central Catholic participated in the filing of the complaint and was represented by counsel. In the complaint, it requested the preliminary injunction that the district court eventually granted. An appellee that has obtained relief cannot dismiss itself from an appeal. See New Jersey Citizen Action v. Edison Township, 797 F.2d 1250, 1253 n.5 (3d Cir. 1986). Otherwise, the IHSAA would be denied the opportunity to attempt to enforce its rules and require Central Catholic to forfeit its games.

lose individual awards, this court held that the student's claims were not moot. By contrast, this court dismissed a challenge to the IHSAA eight semester rule in Jordan, 16 F.3d at 788, because the high school was not a party to the lawsuit. The court reasoned that the student athlete's season had concluded and he had not received any IHSAA-recognized awards; therefore, the sole plaintiff's interest in the case had become moot. In this case, Central Catholic is still a party to this lawsuit and has a continuing interest in the case. The school team's victories and other records may be stricken or forfeited if the injunction is vacated. We therefore have jurisdiction.

B.

1. Applicable Standards

In deciding whether to grant a preliminary injunction, a district court must first determine whether the moving party has demonstrated some likelihood of succeeding on the merits and an inadequate remedy at law if preliminary relief is not granted. If the movant has demonstrated both of these factors, the court must then consider the irreparable harm that the nonmovant will suffer if the preliminary relief is granted, balanced against the harm to the movant. Finally, the court must weigh the public interest by considering the effect of granting or denying relief on nonparties. See Grossbaum v. Indianapolis-Marion County Bldg. Auth., 100 F.3d 1287, 1291 (7th Cir. 1996).

In Lawson Products v. Avnet, 782 F.2d 1429 (7th Cir. 1986), this court set forth in detail the appropriate

methodology for review of a district court's decision to issue a preliminary injunction. In that case, we stressed that, although the applicable standard of review is often described under the shorthand of "abuse of discretion," appellate review "must vary with the nature of the lower court decision." Id. at 1437. This more nuanced approach is necessary because, as we have just noted, the district court's "preliminary injunction decision involves the resolution of a number of different issues, some of which are non-discretionary; others, like the final weighing and the balancing of the equities, are classically left to the discretion of the district judge." Id. Consequently, factual determinations are reviewed under the clearly erroneous standard; the necessary legal conclusions are given de novo review. The district court's balancing of harms is a highly discretionary matter and therefore one to which this court must give substantial deference.

2. Likelihood of Success on the Merits[6]

We turn first to whether the district court was correct in its determination that the plaintiffs have demonstrated a

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6. Although the preliminary injunction was based solely on the ADA, we discuss as well in this section of the opinion cases that interpret the Rehabilitation Act. We have held previously that the standards applicable to one act are applicable to the other. Title II of the ADA was modeled after sec. 504 of the Rehabilitation Act; the elements of claims under the two provisions are nearly identical, and precedent under one statute typically applies to the other. See Grzan v. Charter Hosp. of Northwest Indiana, 104 F.3d 116, 123 (7th Cir. 1997); see also McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 459-60 (6th Cir. 1997) (en banc); Crowder v.

(Cont'd)

"likelihood of success on the merits." In the preliminary injunction context, a "likelihood of success" exists if the party seeking the injunctive relief shows that it has a "better than negligible" chance of succeeding on the merits. Meridian Mutual Ins. Co. v. Meridian Ins. Group, Inc., 128 F.3d 1111, 1114 (7th Cir. 1997).

a. Whether the IHSAA excluded Mr. Washington from playing basketball "by reason of" his disability.[7]

To receive protection under Title II of the ADA, the plaintiffs must establish that the IHSAA rendered

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Kitagawa, 81 F.3d 1480, 1483 (9th Cir. 1996) (noting that sec. 12133 of the ADA, 42 U.S.C. sec. 12133, requires that "[t]he remedies, procedures, and rights set forth in the [Rehabilitation Act] shall be the remedies, procedures, and rights" applicable to section 12132 discrimination claims) (internal quotations omitted). The chief difference between the two statutes is that the Rehabilitation Act applies only to entities receiving federal funding, while Title II of the ADA contains no such limitation. Another difference is that the Rehabilitation Act requires that the exclusion be solely by reason of disability, while the ADA requires only that the exclusion be by reason of the disability.

7. The district court, relying on Alexander v. Choate, 469 U.S. 287, 300 n.19 (1985), addressed the "by reason of disability" and "qualified individual" requirements as one issue. We agree with the district court that the Supreme Court indicated in Choate that these issues are "two sides of the same coin" and that the ultimate issue is whether the requested relief is a reasonable accommodation. We address the issues separately, however, because the IHSAA has raised separate contentions relating to the two requirements.

Mr. Washington ineligible to play "by reason of" his disability.[8] The IHSAA contends that Mr. Washington has not presented any evidence that the IHSAA discriminated intentionally on the basis of disability. It further submits that Mr. Washington's ineligibility stems not from his disability but from the application of a facially neutral eight semester rule and the passage of time. In reply, the plaintiffs contend that they need not prove intentional discrimination.[9] They further submit that they must show only that, but for Mr. Washington's disability, he would be eligible.

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8. Title II of the ADA provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. sec. 12132.

9. The IHSAA suggests in its reply brief in this court that the plaintiffs have not raised adequately a claim based on a theory other than intentional discrimination. The IHSAA failed to raise this argument in its initial brief; therefore, it has waived the argument. We do not consider arguments raised for the first time in the reply brief. Moreover, the complaint does not rely on any sort of intentional discrimination. See, e.g., McWright v. Alexander, 982 F.2d 222, 226 (7th Cir. 1992). In any event, the plaintiffs' motion for a preliminary injunction clearly indicated that its theory was not based on intentional discrimination.

Appendix A

(i)

We cannot accept the suggestion that liability under Title II of the Discrimination Act must be premised on an intent to discriminate on the basis of disability. This court previously has recognized that a plaintiff making a claim under the Rehabilitation Act need not prove an impermissible intent. See McWright v. Alexander, 982 F.2d 222, 228-29 (7th Cir. 1992) (holding that disparate impact claims are cognizable under the Rehabilitation Act). As we have noted, this and other circuits interpret sec. 504 of the Rehabilitation Act and Title II of the ADA as coextensive, except for differences not relevant here. See supra note 6. Although the Supreme Court has not held squarely that a plaintiff need not prove discriminatory intent, it has implied that requiring such proof would be contrary to the intent of Congress. See Alexander v. Choate, 469 U.S. 287, 295-97 (1985). In Choate, the Court indicated that there is strong support in the legislative history for the proposition that the Rehabilitation Act was not intended to prohibit solely intentional discrimination. "Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference — of benign neglect." Id. at 296. The Court also noted that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." Id. at 296-97. Moreover, the other circuits that have considered the issue have taken the view that a plaintiff need not prove an impermissible intent under sec. 504 of the Rehabilitation Act and Title II of the ADA.

Appendix A

See McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 460 (6th Cir. 1997);[10] Crowder v. Kitagawa, 81

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10. The IHSAA relies upon Sixth Circuit case law to support its argument. However, that case law does not indicate that a plaintiff must prove an impermissible intent. In McPherson, the Sixth Circuit, sitting en banc and considering Title II and sec. 504 challenges to a somewhat similar eight semester rule, stated:

> [T]here are two methods that would allow the plaintiff to demonstrate that the MHSAA's actions were taken because of his disability: either (1) by offering evidence that learning disabilities were actually considered by the MHSAA in formulating or implementing the eight-semester rule, or (2) by showing that the MHSAA could have reasonably accommodated his disability, but refused to do so. In the alternative, it might be possible under the ADA for the plaintiff to rely on a disparate impact theory, but the plaintiff has specifically disavowed any reliance on a disparate impact theory, and it is not necessary for us to explore the availability and contours of such a claim in the ADA context.

119 F.3d at 460. This passage makes clear that our colleagues in the Sixth Circuit did not believe that a plaintiff had to establish discriminatory intent to establish a violation of Title II of the ADA. The court simply noted that such a path was one possible method of proof. In considering this intent-based method of proof, the Sixth Circuit stated that disabilities were not considered by the Michigan High School Athletic Association in passing its eight semester rule. It is in this context that the court stated that the plaintiff's ineligibility resulted from the passage of time, not the disability.

Notably, the court did not end its discussion with this first method of proof but went on to consider the second method of

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F.3d 1480, 1483-84 (9th Cir. 1996); Norcross v. Sneed, 755 F.2d 113, 117 n.4 (8th Cir. 1985); Pushkin v. Regents of the Univ. of Colorado, 658 F.2d 1372, 1385 (10th Cir. 1981); Prewitt v. United States Postal Serv., 662 F.2d 292, 306 (5th Cir. 1981).

In our view, the Sixth Circuit outlined correctly in McPherson the various methods of proof in sec. 504 Rehabilitation Act or Title II ADA claims: discrimination under both acts may be established by evidence that (1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable modification, or (3) the defendant's rule disproportionally impacts disabled people. Here we deal with the second approach. There is substantial support for basing a cause of action on the failure to provide reasonable accommodation. Considering a claim under sec. 504 of the Rehabilitation Act, the Supreme Court implied the validity of this method of proof of discrimination in Southeastern Community College v. Davis, 442 U.S. 397 (1979), when it stated that "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory." Id. at 413. In Choate, the Court, after quoting this passage, stated that Davis struck a balance between requiring reasonable

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proof — whether the IHSAA could have reasonably accommodated the plaintiff, but had refused to do so. Moreover, the court suggested that a disparate impact-type claim may be cognizable, thereby further indicating that an intent element is not required. Under Sixth Circuit case law, therefore, a facially neutral rule adopted for neutral purposes and applied on a neutral basis is not always insulated from review.

modifications and fundamental or substantial modifications. See 469 U.S. at 300. The Court further indicated its understanding that the issues of reasonable modification and discrimination are linked when it stated:

> [T]he question of who is "otherwise qualified" and what actions constitute "discrimination" under the section would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications in its programs for the needs of the handicapped.

Id. at 300 n.19.

We note that the method of proving discrimination in disability cases by evidence of failure to provide reasonable modification is also recognized under Titles I and III of the ADA and the Fair Housing Amendments Act of 1988. See 42 U.S.C. sec.sec. 12112(b)(5)(A) & 12182(b)(2)(A)(II); 42 U.S.C. sec. 3604(f)(3). Perhaps most significantly, the ADA's legislative history indicates that the methods of proving discrimination under Titles I and III of the ADA also apply to Title II. The House Report states:

> The Committee has chosen not to list all the types of actions that are included within the term "discrimination," as was done in titles I and III, because [title II] essentially simply extends the anti-discrimination prohibition embodied in section 504 [of the Rehabilitation Act] to all actions of state and local governments. The

> Committee intends, however, that the forms of discrimination prohibited by [title II] be identical to those set out in the applicable provisions of titles I and III of this proposed legislation.

H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 84 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 367. Therefore, Congress clearly intended the failure-to-accommodate method of proving discrimination to apply to Title II.

The approach the Sixth Circuit has taken, and the approach we take, does not completely do away with a discrimination requirement. We simply hold that it is possible to demonstrate discrimination on the basis of disability by a defendant's refusal to make a reasonable accommodation. Therefore, we conclude that the plaintiffs need not prove that the IHSAA intended to discriminate on the basis of disability. The statute simply requires that the plaintiffs establish that the defendant's refusal to grant Mr. Washington a waiver was a failure to make a reasonable accommodation.

(ii)

The IHSAA's argument that Mr. Washington has not been excluded from playing basketball by reason of his disability, but rather by reason of the passage of time, could be interpreted as an argument based on causation rather than an argument based on intent. Such an argument, however, must also fail.

There must be a causal connection between the disability and Mr. Washington's ineligibility. The IHSAA submits that

no such causality exists and that it is the mere passage of time, and not the disability, that caused Mr. Washington's ineligibility in this case. The IHSAA relies upon McPherson and Sandison v. Michigan High School Athletic Ass'n, 64 F.3d 1026, 1029 (6th Cir. 1995), to support its argument. The portion of the McPherson decision upon which the IHSAA relies states:

> As is obvious, the plaintiff has no evidence, and has not even suggested, that the formulation or implementation of the MHSAA's eight-semester rule has in any way been motivated by considerations of barring students with learning disabilities from play. As we explained in Sandison with regard to the 19-year age limit at issue there, the regulation is a "neutral rule" — neutral, that is, with respect to disability — and as far as the record shows, is neutrally applied by the MHSAA. Throughout the plaintiffs' first three years of high school, [the age limit rule] did not bar the students from playing interscholastic sports, yet the students were of course learning disabled during those years. It was not until they turned nineteen that [the age limit] operated to disqualify them. Accordingly, we must conclude that the age regulation does not exclude students from participating "solely by reason of" their disability. Sandison, 64 F.3d at 1032. As we concluded, "[t]he plaintiffs' respective learning disability does not prevent the two students from meeting the age requirement; the passage of time does." Id. at 1033. McPherson's claim depends,

> therefore, upon a showing that the MHSAA could have reasonably accommodated him and refused to do so.

McPherson, 119 F.3d at 460. Viewing the Sixth Circuit's "passage of time" holding in context, it is clear that the court was addressing only the first intentional discrimination method of proof, not the issue of causation. Otherwise, the court would not have gone on to discuss independently the alternative method of proof — the failure to make reasonable modification. Therefore, read in context, the Sixth Circuit's analysis merely indicates that the application of a neutral rule that makes a student ineligible because of the passage of time cannot support a claim for intentional discrimination. The court's analysis does not indicate that the passage of time is the legal cause of the ineligibility.

We believe, moreover, that Mr. Washington has met the causation requirement for his claims. The "by reason of" language merely indicates that he must establish that, but for his learning disability, he would have been eligible to play sports in his junior year. See Dennin v. Connecticut Interscholastic Athletic Conference, Inc., 913 F. Supp. 663, 669 (D. Conn.), vacated as moot, 94 F.3d 96 (2d Cir. 1996).[11] Simply stated, Mr. Washington claims that his disability

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11. See also Katie M. Burroughs, Learning Disabled Student Athletes: A Sporting Chance Under the ADA?, 14 J. Contemp. Health L. and Pol'y 57, 78 (1997); Gary Lawton, AIDS, Astrology and Arline: Towards a Causal Interpretation of Section 504, 17 Hofstra L.Rev. 237, 259-65 (1989); Adam Milani, Can I Play? The Dilemma of the Disabled Athlete in Interscholastic Sports, 49 Ala. L. Rev. 817, 859-60 (1998).

caused him to drop out of school; otherwise he would have been able to play high school basketball. In the absence of his disability, the passage of time would not have made him ineligible. There is ample record evidence to support Mr. Washington's claim. Mark Zello, a school psychologist, testified at the preliminary injunction hearing. He stated that Mr. Washington's learning disability caused him to fail at school, and that students with learning disabilities like Mr. Washington's have a high drop-out rate. Moreover, Zello testified that Mr. Washington has above average intelligence and, without the learning disability, would be fully capable of performing in high school. Under these circumstances, the district court was justified in concluding that, but for Mr. Washington's learning disability, he would not have dropped out of school.[12]

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12. The IHSAA argues that this court must give deference to the IHSAA's initial determination that Mr. Washington's learning disability did not cause his absence from school. The IHSAA has waived this argument. It did not raise the issue in its initial brief in this court, and even in its reply brief it does not explain the basis for the finding that Mr. Washington's disability did not cause him to drop out of school. Moreover, we note that the IHSAA relies on a Supreme Court of Indiana case that holds that, under Indiana law, Indiana courts must apply an arbitrary and capricious standard of review to decisions of the IHSAA. See Indiana High Sch. Athletic Ass'n v. Carlberg, 694 N.E.2d 222, 231 (Ind. 1997). This case is clearly inapplicable to our review of the IHSAA's decisions under federal law, and we can discern no basis in Title II of the ADA for treating the IHSAA's finding deferentially.

b. Whether Mr. Washington is a "qualified individual" under Title II of the ADA

(i)

To receive protection under Title II of the ADA, Mr. Washington must be a "qualified individual." See 42 U.S.C. sec. 12132. Under Title II, a qualified individual is "an individual with a disability, who with or without reasonable modifications to rules, . . . meets the essential eligibility requirements for the . . . participation in programs or activities provided by a public entity." 42 U.S.C. sec. 12131(2) (emphasis added). Similarly, under the analogous section of the Rehabilitation Act, " '[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap,' . . . with reasonable accommodation." Knapp v. Northwestern Univ., 101 F.3d 473, 482 (7th Cir. 1996) (quoting Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979)).

The parties disagree whether waiver of the eight semester rule in Mr. Washington's case constitutes a "reasonable modification." Resolution of this issue turns on whether waiver of the rule would generally be a fundamental alteration to the purpose of the IHSAA rule or would create undue financial and administrative burdens. See School Bd. of Nassau County v. Arline, 480 U.S. 273, 288 n.17 (1987); Davis, 442 U.S. at 412; McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 461 (6th Cir. 1997) (en banc).

In determining whether a person is a "qualified individual" and whether the modification is reasonable, a

divided panel of one circuit has held that, before the court addresses whether modification of the rule would be a reasonable modification in the specific case at hand, it must determine "whether an individual meets all of the essential eligibility requirements." Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926, 929 (8th Cir. 1994). Under this approach, even if waiver of a rule would be reasonable under the circumstances of the particular case, the waiver would not be required if the rule itself is generally an essential or necessary eligibility requirement. See Id. We think, however, that the better view is to ask whether waiver of the rule in the particular case at hand would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change. See Pottgen, 40 F.3d at 931 (Arnold, C.J., dissenting); Dennin, 913 F. Supp. 663, 668-69; Johnson v. Florida High Sch. Activities Ass'n, 899 F. Supp. 579, 585 (M.D. Fla. 1995), vacated as moot, 102 F.3d 1172 (11th Cir. 1997); University Interscholastic League v. Buchanan, 848 S.W.2d 298, 302 (Tex. Ct. App. 1993).

In short, we believe that the analysis of Chief Judge Richard Arnold in dissent in the Pottgen case and of the en banc majority of the Sixth Circuit in McPherson is more compatible with the congressional intent.[13] In analyzing an

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13. The waiver situation that confronted the Sixth Circuit in McPherson prohibited students who had been enrolled for eight semesters from participating in athletics; the Indiana rule, by contrast, counts all semesters, whether or not the student is enrolled. The plaintiff in McPherson sought eligibility for his ninth semester of enrollment; he had not played in several previous semesters

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because he was declared academically ineligible under his school's standards, which were more strict than the standards of the Michigan High School Athletic Association ("MHSAA"). The Sixth Circuit addressed whether a waiver of the MHSAA eight semester rule would be a reasonable accommodation or whether such a waiver would impose undue financial and administrative burdens or require a fundamental alteration of the program. The court initially noted that the Association's "determination that a rule may sometimes be waived under some circumstances does not mean that the rule, as a general matter, is not 'necessary' to the successful functioning of a sports program." Id. at 461. The court found that a waiver would create a fundamental alteration because the Association's goals of reducing redshirting and promoting the preeminence of education over athletics would be harmed. The court also noted that requiring a case-by-case analysis of which students should be granted waivers would create undue financial and administrative burdens. In this respect, the court found waiver of the eight semester rule to be as unreasonable as waiver of the age rule it considered in Sandison v. Michigan High School Athletic Ass'n, 64 F.3d 1026 (6th Cir. 1995). Notably, the court then turned to a more individualized discussion of the case and stated:

> We are not insensible, however, to the plaintiff's contention that the existence of past waivers makes it inherently unreasonable to require the MHSAA to grant a waiver in this case. However, there are important differences between those cases and this. The only reason McPherson did not participate in basketball during the ninth and tenth grades, and during his first year in the eleventh grade, was that the Ann Arbor school district forbade him to do so because it held him to a higher academic eligibility requirement than was required by the MHSAA. . . . Thus, . . . to allow a waiver under these circumstances would create a highly

(Cont'd)

employment discrimination claim under sec. 504 of the Rehabilitation Act, the Supreme Court has stated:

> The remaining question is whether [the plaintiff] is otherwise qualified for the job . . . . To answer this question in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if sec. 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.

(Cont'd)

> unfavorable precedent, in which a school district can have control over a player's eligibility, find that player to be ineligible, and then later, when he has physically and athletically matured, find him eligible. In short, to require a waiver here would be to give the green light to school districts and coaches who wish to engage in widespread redshirting.

Id. at 463.

To characterize McPherson as espousing the rigid approach of the Eighth Circuit majority in Pottgen, it is necessary to ignore the court's individualized assessment of the risk of redshirting. However, this reading would ignore McPherson's statement that it was "not insensible . . . to the . . . contention that the existence of past waivers makes it inherently unreasonable to require the MHSAA to grant a waiver in this case" and the individualized discussion of the risk of redshirting presented by the facts of that particular case. Id.

School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987) (emphasis added). The ADA regulations similarly indicate that Arline requires an individualized analysis.[14]

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14. The appendix to the Title II regulations states:

> In School Board of Nassau County v. Arline, 480 U.S. 273 (1987), the Supreme Court recognized that there is a need to balance the interests of people with disabilities against legitimate concerns for public safety. Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others will not be "qualified," if reasonable modifications to the public entity's policies, practices, or procedures will not eliminate that risk.
>
> The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. This is the test established by the Supreme Court in Arline. Such an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks.

28 C.F.R. Pt.35, App.A (Preamble to Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services) (emphasis added).

Moreover, commentators overwhelmingly agree that an individualized inquiry is necessary.[15]

We think that the individualized approach is consistent with the protections intended by the ADA. The entire point of Arline's statement that a person is otherwise qualified if he is able to participate with the aid of reasonable accommodations is that some exceptions ought to be made to general requirements to allow opportunities to individuals with disabilities. To require a focus on the general purposes behind a rule without considering the effect an exception for a disabled individual would have on those purposes would negate the reason for requiring reasonable exceptions.

(ii)

We now turn to an examination of the particular situation before us in this case.

At the outset, it must be noted that the eight semester rule that the Sixth Circuit refused to waive in McPherson

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15. See Colleen M. Evale, Sandison v. Michigan High School Athletic Ass'n: The Sixth Circuit Sets up Age Restrictions as Insurmountable Hurdles for Learning-Disabled High School Student-Athletes, 5 Sports Law J. 109, 134 (1998); Mark Freitas, Applying the Rehabilitation Act and the Americans with Disabilities Act to Student-Athletes, 5 Sports Law J. 139, 162 (1998); Milani, supra note 11, at 868-69; Burroughs, supra note 11, at 78; John Wolohan, Are Age Restrictions A Necessary Requirement for Participation in Interscholastic Athletic Programs?, 66 U. Mo. Kansas City L. Rev. 345, 355 (1997) (noting that an individualized analysis is required).

and the eight semester rule in this case are distinct in a very material respect. The Michigan rule restricts eligibility to eight semesters of enrollment, while the Indiana rule creates ineligibility automatically eight semesters from the first day of enrollment, even if the student was not enrolled for the full eight semesters. Under the Indiana rule, the eligibility "clock" therefore continues to "tick" when a student drops out of school; the clock does not tick for the Michigan student who drops out of school. Notably, Mr. Washington requested only that the semesters that he was absent from school because of his disability not count toward his eight semesters of eligibility; he did not ask that the IHSAA be prohibited from allowing the eligibility clock to run while he was enrolled. Indeed, he is merely asking that the IHSAA apply a rule identical to the rule the MHSAA applies to its students.

We believe that the district court was on solid ground in determining that waiver of the eight semester rule in Mr. Washington's case would not create a fundamental alteration of the eight semester rule. Such a minimal request for a rule modification is much more reasonable and less fundamental than the waiver requested in McPherson. The IHSAA's argument to the contrary is particularly unpersuasive because it has granted waivers of the eight semester rule in the past, thereby establishing that waivers do not always work fundamental alterations of the rule. Moreover, none of the dangers that motivated adoption of the rule is present in this case. The primary goals of the rule are to control redshirting, to prevent the preeminence of athletics over academics, and to keep larger, more advanced players from dominating competition. Mr. Washington was clearly not redshirted — nobody was interested in his basketball abilities until he had

already left school. Moreover, waiver of the rule in Mr. Washington's case does not indicate that athletics is valued over education. Indeed, waiver of the rule in Mr. Washington's case has promoted his education. Mr. Washington has re-entered school because of basketball, has improved his grades in part due to the influence of basketball and his coach, and is even considering going to college. Application of the eight semester rule to Mr. Washington does not appear to add anything to the protections provided by the IHSAA's age limit rule, which generally limits the size, strength and athletic maturity of student athletes.

Nor will the record support the argument that a waiver of the rule in Mr. Washington's case would place an undue administrative or financial burden on the IHSAA. The record indicates that Mr. Washington is the only student athlete to seek a waiver because of a learning disability in more than a decade. The few case-by-case analyses that the IHSAA would need to conduct hardly can be described as an excessive burden. The IHSAA already conducts individualized inquiries into whether student athletes with physical impairments should receive a waiver; requiring such an analysis in disability cases will not be a significant additional burden.

In the end, then, McPherson is based upon a case-specific individualized assessment that entertaining a waiver argument under a rule that counted only enrolled semesters, in some of which the student was academically ineligible, would give a green light to redshirting. By contrast, and as conceded by the IHSAA, there was no risk of redshirting in

this case. The granting of a waiver to Mr. Washington frustrates no purpose of the rule.[16]

C. Balancing the Interests

The IHSAA also asks that we review the district court's conclusion that the irreparable harm to the plaintiffs outweighed any threatened harm to the IHSAA and the public. This court reviews the district court's balancing of the equities under an abuse of discretion standard and the findings of fact for clear error. See TMT North America, Inc. v. Magic Touch GmbH, 124 F.3d 876, 881 (7th Cir. 1997).

The district court found that Mr. Washington would be irreparably harmed if he did not obtain an injunction, because if he were not allowed to play, he would lose out on the chance to obtain a college scholarship and he would have a diminished academic motivation. The IHSAA's first argument is that the loss of a potential college scholarship is too speculative to constitute irreparable harm. However,

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16. The Sixth Circuit in Sandison v. Michigan High School Athletic Ass'n, 64 F.3d 1026 (6th Cir. 1995), and the Eighth Circuit in Pottgen v. Missouri State High School Activities Ass'n, 40 F.3d 926, 930 (8th Cir. 1994), have considered an age limit rule and have held that waiver of that rule would not be a reasonable modification. Age limits usually are justified on the ground that they prevent stronger and larger players from dominating athletics and harming younger players. No such rule is before us in this case. Indeed, although Indiana has such a rule and although it will prevent Mr. Washington's playing high school basketball in the future, he has brought no challenge to that rule in this litigation.

Appendix A

Purdue University basketball coach Gene Keady testified at the preliminary injunction hearing that Mr. Washington would be harmed by an inability to play basketball in his high school games because basketball scouts would not have an opportunity to view him playing. Dunwoody, Mr. Washington's coach and academic mentor, testified to the same effect. The district court's finding is therefore not clear error.

The IHSAA also argues that the district court erred in determining that irreparable harm would stem from Mr. Washington's loss of academic motivation if he were declared ineligible. The IHSAA notes that Mr. Washington would not be prohibited from continuing to attend Central Catholic, or any other school, if he had been ineligible to play basketball. The district court did not commit clear error in finding that Mr. Washington would suffer irreparable harm from a lost academic desire. Zello, the school psychologist, testified that basketball is an important part of Mr. Washington's academic success at Central Catholic. Before he started at Central Catholic, Mr. Washington had experienced a career of academic failure due to his learning disability. His lack of self confidence prevented him from performing well academically. By giving him something at which he could excel, basketball improved his confidence in other areas of life, including education. When asked what the consequence would be if Mr. Washington were not allowed to play basketball, Zello stated:

> I think it would be difficult. This is a child who has been thoroughly frustrated academically, socially, family problems from that, who now gets

> a taste of success, and then we're going to pull that away from him? . . . I think it would be devastating.

Tr. at 39. Dunwoody made a similar statement in his testimony. Moreover, the record indicates that Mr. Washington's grades improved when he started playing basketball, and he lost motivation when the IHSAA determined that he would be ineligible.

On the other side of the balance, the IHSAA argues that it would face financial and administrative burdens in determining who is eligible for waiver, that another student-athlete would be displaced by Mr. Washington and that Mr. Washington would change the level of competition. However, the district court's finding that the administrative burden would not be significant is supported by the record; Mr. Washington was the first student with a learning disability to bring such a request within more than a decade. The court also determined that the displacement of another student by Mr. Washington's presence on the basketball team did "not over-balance the scale against the well-documented harm to Eric if his eligibility is terminated." R.17. Moreover, the court noted that the public's interest in maintaining a level field of competition would not be overly affected. The district court's balancing the IHSAA's interests against Mr. Washington's interests was not an abuse of discretion.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMON DIVISION AT LAFAYETTE DATED DECEMBER 22, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

No 4:98 cv 58 AS

ERIC WASHINGTON and
CENTRAL CATHOLIC HIGH SCHOOL,

Plaintiffs,

v.

INDIANA HIGH SCHOOL ATHLETIC ASSOCIATION, INC., et al.,

Defendants.

MEMORANDUM AND ORDER

I. Procedural History

This cause is before this court on the motion of plaintiff Eric Washington ("Eric") for a preliminary injunction, enjoining the defendant Indiana High School Athletic Association ("IHSAA") from finding him ineligible to play basketball during the second semester of the 1998-1999 school year. An evidentiary hearing and oral argument were

heard in Charles A. Halleck Federal Building on December 3, 1998 by this court, and briefs were filed by the parties simultaneously on December 14, 1998. As the court has fully considered the issues here presented, it is now ready to rule.

II. Facts

Eric is currently a six foot seven inch, 18-year old student at Central Catholic High School in Lafayette, Indiana, where he is one credit shy of junior status. Eric has not had a positive academic history; he was routinely advanced through elementary school despite failing grades and he was held back after his eighth grade year at Tecumseh Middle School in Lafayette, a public school. Eric repeated the first semester of eighth grade and continued to receive failing grades. The school officials determined that he might do better if he stayed with his class and thus advanced him to the ninth grade at Lafayette Jefferson High School at the beginning of the second semester during the 1994-95 academic year. However, Eric continued to fail during that spring semester and the academic year, 1995-96, that followed. Early in the academic year 1996-97, a school counselor suggested to Eric that he should drop out of high school to try to get focused. Shortly thereafter, Eric did drop out of high school and spent the 1996-97 academic year working at a grocery store and with a lawn service.

Eric had never played organized basketball, but in the summer of 1997, he participated in a three-on-three basketball tournament sponsored by Central Catholic. One of his opponents was the coach of the Central Catholic basketball team, Chad Dunwoody, with whom Eric spoke

briefly. This encounter spurred Eric to reconsider his education and he asked his parents to allow him to attend Central Catholic and restart his academic career. Eric was admitted to Central Catholic on a probationary basis and assigned Coach Dunwoody as a mentor. After a few weeks, Dunwoody recommended that Eric be tested for learning disabilities. Although Eric had been previously tested and found not to be disabled, at his test in January, 1998, he was found to have a learning disability. In the meanwhile, Eric began playing basketball for Central Catholic. Although he had never played on a school team, Eric quickly developed a prowess and became the team's highest scorer and rebounder, leading the team to the Class A state championship.

Over the summer, Central Catholic officials realized that due to Eric's mid-semester advancement to the ninth grade, Eric might run afoul of the IHSAA's Rule 12, the "eight semester" rule, which limits a student's eligibility to play high school sports to the first eight semesters following a student's commencement of the ninth grade. Central Catholic requested a waiver for Eric, either as a waiver under Rule 12 or a waiver under Rule 17, the "hardship" rule, but the IHSAA Executive Director denied that request. Eric appealed that ruling to the IHSAA Executive Committee, which held a hearing on September 10, 1998. On September 17, 1998, during a five-minute telephonic conference, the Executive Committee denied Eric's appeal by roll call vote.

Eric is clearly a talented basketball player, and his coach believes that he may be capable of playing basketball at a Division I college. However, due to his late start in organized

ball, he will require more exposure. Eric will be ineligible for the 1999-2000 season due to the IHSAA Rule 4, the "age" rule, and he is not challenging that rule's effect. However, he hopes to play for a prep school next year, and will need to be seen this year to obtain a scholarship for such an opportunity. Due to his parent's financial situation, Eric would not be able to attend prep school or college without scholarship assistance. Thus, Eric asserts that the loss of the remainder of the season and the tournament would irreparably harm him. Additionally, this court heard testimony suggesting that Eric's grades and self-esteem will suffer considerably if he is unable to continue playing basketball.

III. Analysis

The factors for analyzing a motion for preliminary injunctive relief have remained constant. *See Grossbaum v. Indianapolis-Marion County Bldg. Authority*, 100 F.3d 1287 (7th Cir. 1996); *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6 (7th Cir. 1992); *Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732 (7th Cir. 1987); *BearMart, Inc. v. The Stroh Brewery Co.*, 804 F.2d 409 (7th Cir. 1986). Before a preliminary injunction may issue:

> a district court must first determine whether the moving party has demonstrated 1) some likelihood of prevailing on the merits, and 2) an inadequate remedy at law and irreparable harm if preliminary relief is denied. If the movant demonstrates both, the court must then consider 3) the irreparable harm the nonmovant will suffer

> if preliminary relief is granted, balanced against the irreparable harm to the movant if relief is denied, and 4) the public interest, meaning the effect that granting or denying the injunction will have on nonparties.

Grossbaum, 100 F.3d at 1291, citing *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1067 (7th Cir. 1994). The decision to grant or deny preliminary injunctive relief is committed to the sound discretion of the district judge. *Grossbaum*, 100 F.3d at 1092. The Seventh Circuit has adopted a "sliding scale" approach when balancing the four factors. *See Gateway Eastern Ry. Co. v. Terminal R.R. Ass'n of St. Louis*, 35 F.3d 1134 (7th Cir. 1994). The movant must initially meet the first two prerequisites. *Roth v. Lutheran General Hosp.*, 57 F.3d 1446 (7th Cir. 1995). Then the inquiry becomes a 'sliding scale' analysis of the harm to the parties and the public from the grant or denial of the injunction and the actual likelihood of success on the merits. *Id.*

This court has no difficulty determining that this plaintiff will suffer irreparable harm for which he has no adequate remedy at law if this injunction is denied. The loss of the remainder of the basketball season, and with that, most likely the loss of any future playing opportunities and the loss of the desire to continue academically, are harms which cannot be repaired, for which Eric cannot be adequately compensated. Thus, the court's attention turns to the merits of Eric's claims.

Eric's sole argument in his brief is that the IHSAA's application of the eight-semester rule to his case violates

Appendix B

§504 of the Rehabilitation Act, 29 U.S.C. §794(a), and Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12132. These acts are substantially similar, with the primary difference being that §504 requires that the entity receive federal funding. Thus, the court will consider these claims together. The three requirements that are identical to both acts are as follows: (1) a claimant who suffers from a disability, (2) who is "otherwise qualified" to participate in the program, and (3) who is "being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of his handicap [disability]." *Sandison v. Michigan High School Athletic Ass'n*, 64 F.3d 1026 (6th Cir. 1995). The IHSAA has not disputed that Eric suffers from a disability. Thus, the dispute centers around elements two and three, whether Eric is "otherwise qualified" and whether he will be excluded "solely by reason of" his disability. In *Alexander v. Choate*, 469 US. 287 (1985) the Supreme Court held that "otherwise qualified" and "subjected to discrimination" combine into an inquiry of the "extent to which a grantee is required to make reasonable modifications in it programs for the needs of the handicapped." *Id.* at 299, n.19. Thus, the question is whether waiving the rule in this instance is a reasonable modification.

Several courts have considered challenges to the eight-semester rules of other states, including Michigan, *McPherson v. Michigan High School Athletic Ass'n*, 119 F.3d 453 (6th Cir. 1997), Oregon, *Bingham v. Oregon School Activities Ass'n.*, __ F.Supp. 2d __, 1998 WL 748692 (D.Or., Oct. 22, 1998), and Ohio, *Rhodes v. Ohio High School Athletic Ass'n.*, 939 F.Supp. 594 (N.D.Oh. 1996). Other

courts have considered an analogous rule, one limiting athletic eligibility to student under a certain age, in states including Michigan, *Sandison v. Michigan High School Athletic Ass'n*, 64 F.3d 1026 (6th Cir. 1995), Missouri, *Pottgen v. Missouri State High School Activities Ass'n.*, 40 F.3d 926 (8th Cir. 1994), Florida, *Johnson v. Florida High School Activities Ass'n., Inc.*, 899 F.Supp. 579 (M.D.Fla. 1996), and Connecticut, *Dennin v. Conn. Interscholastic Athletic Conf., Inc.*, 913 F.Supp. 663 (D.Conn. 1996). The courts have taken different approaches to the requirements of the ADA and Rehabilitation Act in making their determinations. The Sixth Circuit in *Sandison* and the Eighth Circuit in *Pottgen* focused on the third element stated above, that the plaintiff was excluded "solely by reason of" his disability, and determined in those age rule case that the passage of time had caused the plaintiffs to violate the age rule, rather than their disabilities. Furthermore, the courts found those age rules to be essential, fundamental eligibility requirements, and thus waiving them, the only accommodation available, would be inappropriate. The Sixth Circuit relied on *Sandison* in determining *McPherson*, and the Ohio court that determined *Rhodes*, as a lower court in the Sixth Circuit, was compelled to follow the logic of *Sandison* in its decision as well. (Additionally, the plaintiff in *Rhodes* may have repeated the ninth-grade for reasons other than his learning disability, thus weakening the causative link between his disability and his violation of the eight-semester rule.)

Other courts have taken a different tack in considering these issues. In *Johnson* and *Dennin*, the courts focused on the individual waiver requested and determined in those two cases that waiving the age rule for those young men would

not fundamentally alter the nature of the program because those two athletes had not gained a competitive advantage with their additional years in school and had not been "red-shirted." Similarly, in *Bingham*, the court determined that granting the individual student the waiver requested would not frustrate the anti-red-shirting policy inherent in the eight-semester rule, nor did it frustrate the rule's purpose of encouraging students to graduate within four years, when the "failure to do so is caused by a serious disability beyond the student's control." 1998 WL 748692 at *6.

In a related area, the Northern District of Illinois considered these issues in addressing a challenge to the NCAA eligibility rules by a learning disabled student in *Ganden v. National Collegiate Athletic Assn.*, 1996 WL 680000 (N.D.Ill. Nov. 21, 1996). Finding that the "ADA and Rehabilitation Act focus on whether the defendant has provided a reasonable accommodation to an individual on the basis of a known disability," the court considered whether allowing the student to participate despite his academic ineligibility would "fundamentally alter" the program. *Id.* at *13, 14. Specifically, that court found that it "must look to the underlying purposes of an eligibility requirement to determine if the modification of a rule rationally tailored to the denied privilege would be unreasonable." *Id.* at *15. Although the *Ganden* court found that the accommodation sought was a fundamental alteration of the program, it considered the rule as applied to the individual in making that determination.

This court finds that a similar inquiry must be taken here. The philosophy of the rule as published by the IHSAA is

that the eight-semester rule has the purposes of discouraging red-shirting, providing uniform standards, asserting the primacy of academics over athletics, encouraging graduation, creating interschool athletic opportunities for younger students, promoting competitive equality among schools, and promoting health and safety. The rule has an exception for injury or illness which "necessitates the student's complete withdrawal from the school," and allows the student to not count that semester as one of the eight consecutive semesters, so long as the withdrawal is reported to the Association and supported by written verification from the student's physician. The eight-semester rule must be considered in conjunction with the hardship rule, Rule 17, which states as follows:

> The Commissioner or his designee or the Committee shall have the authority to set aside the effect of any Rule, when, in the opinion of the Commissioner . . ., *all of the following conditions are met:*
>
> a. Strict enforcement of the Rule in the particular case will not serve to accomplish the purpose of the Rule;
>
> b. The spirit of the Rule has not been violated; and
>
> c. There exists in the particular case circumstances showing an undue hardship which would result from enforcement of the Rule.

Appendix B

The rule further states that "the conditions which cause . . . the failure to meet the eligibility requirements must be beyond the control of the school, the coach, the student, the parents and/or the affected party" and that "injury, illness or accidents which cause a student to fail to meet a basic requirement are possible causes for a hardship consideration." Although Eric does not qualify for the exception to Rule 12 because his withdrawal was not reported to the IHSAA, it is notable that an exception does exist to the rule, and the deposition testimony of Commissioner Gardner establishes that waivers have been granted under that exception.

Following the logic of *Johnson*, *Dennin*, and Ganden, this court must look to the underlying purposes of the rule to see if waiving the rule in this instance would be a reasonable accommodation. There is no dispute that red-shirting is not an issue here; Eric never played in any school athletics prior to his enrollment at Central Catholic, and the IHSAA does not argue that Eric was red-shirted. Thus, allowing the waiver would not violate the anti-red-shirting purpose of the rule. The second major purpose of the rule is to assert the primacy of academics over athletics and encourage graduation. In Eric's case, it is clear that the rise in Eric's self-esteem created by his participation in basketball is spurring his academic achievement; thus, allowing the waiver will in this case fulfill the purpose of encouraging graduation. The third major purpose of the rule is the health and safety and competitive equality concern. As Judge Lee explained in *Jordan by Jones v. Indiana High School Athletic Ass'n.*, 813 F.Supp. 1372, 1380 (N.D.Ind. 1993), these "chronological maturity interests" are primarily covered by

Rule 4, the age rule, and as in *Jordan*, Eric is still eligible under the age rule. But for the decision of the school authorities at Tecumseh Middle School to advance Eric to Lafayette Jefferson High School in the middle of the school year, Eric would be eligible for this entire school year. Waiving the rule in this instance does not do violence to its purposes; Eric was not attempting to red-shirt during the year he was out of school, and allowing him to play would encourage his further academic progress. The athletic maturity concerns of the rule are equally covered by Rule 4, and Eric is still eligible under that rule for this school year. Unlike the other eight-semester cases cited, Eric has not been enrolled for eight semesters, although eight semesters have passed since his initial enrollment in high school. Thus, this is not a case where Eric is receiving a semester of eligibility for his ninth semester of enrollment; rather, the waiver grants Eric a semester of eligibility for his seventh semester of enrollment, for which most students would have no question of eligibility. Eric is in a unique situation, and a waiver of the rule in this circumstance would not do violence to the purposes of the rule. Thus, the court finds that a waiver of the rule is a reasonable accommodation for Eric's disability.

The IHSAA then argues that it did not receive federal financial assistance as required for the Rehabilitation Act and that it is not a public entity as required by the Americans with Disabilities Act. The court agrees that Eric has not proved that the IHSAA receives federal financial assistance as required by the Rehabilitation Act, and thus it cannot grant relief on that claim. However, the court does not agree with the IHSAA's assertion that it is not a public entity. The ADA defines a "public entity" as a state or local government or

any department, agency, special purpose district, or other instrumentality of a state or states or local government. In *Indiana High School Athletic Ass'n. v. Carlberg*, 694 N.E.2d 222 (Ind. 1997), the Indiana Supreme Court determined that the actions of the IHSAA are "state action" for purposes of constitutional review. If the actions of the IHSAA are state action, then the IHSAA must be a state actor, and as such is a public entity for purposes of the ADA. Thus, the ADA applies, and this court can grant relief under that statute.

As the court has found a substantial likelihood of success on the merits and irreparable harm to Eric if the relief is not granted, the court must now look to the possible harm to the IHSAA if the relief is granted. The IHSAA argues that it will be flooded with cases of this nature if relief is granted in this case. However, Eric is the first person with a learning disability to request relief under Rule 12 in the past decade plus that Commissioner Gardner has been with the IHSAA. Thus, the court finds that this harm is not terribly likely. The IHSAA also argues that allowing Eric to play will displace another student who would be able to play at Central Catholic. Although the court appreciates that Eric's eligibility will affect another student's right to play, the theoretical harm to that student does not over-balance the scale against the well-documented harm to Eric if his eligibility is terminated. Finally, the public's interest in maintaining a level field of competition will not be overly affected by allowing this one-time waiver. Thus, after performing the balancing required, the court finds the injunction should issue.

Appendix B

IV. Conclusion

Having considered the issues presented, the court now **GRANTS** plaintiff's motion for preliminary injunction and **ENJOINS** the IHSAA from denying Eric Washington eligibility for the spring semester of the 1998-1999 school year.

IT IS SO ORDERED.

Dated: December 22, 1998

s/ Allen Sharp
ALLEN SHARP, JUDGE
NORTHERN DISTRICT OF INDIANA

APPENDIX C -- RULES INVOLVED

RULE 12 — ENROLLMENT AND ATTENDANCE

PHILOSOPHY

The following are the goals of the IHSAA for the Enrollment and Attendance Rule:

a. **The Enrollment and Attendance Rule provides uniform standards for all schools to follow in maintaining a fundamentally fair and equitable framework for athletic competition in an educational setting.**

b. **The Enrollment and Attendance Rule supports the educational philosophy that athletics is a privilege which must not be permitted to assume a dominant position in a school's program.**

c. **The Enrollment and Attendance Rule keeps the focus of educators and student on the fact that students attend school to receive an education first, and participate in athletics second.**

d. **The Enrollment and Attendance Rule promotes and encourages students to progress through high school toward graduation and a diploma.**

e. **The Enrollment and Attendance Rule discourages the practice of redshirting.**

f. **The Enrollment and Attendance Rule discourages any and all decisions which subordinate academic decisions to athletic decisions.**

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g. The Enrollment and Attendance Rule creates interschool athletic opportunities for younger students.

h. The Enrollment and Attendance Rule promotes competitive equality among member schools.

i. The Enrollment and Attendance Rule promotes the health and safety of student athletes.

* * *

C–12-2

After enrollment in the 9th grade for 15 or more school days, students shall be eligible for no more than *four (4)* consecutive *years, or the equivalent. (e.g. 12 semesters in a tri-mester plan, etc.)*

C–12-3

After enrollment in the 9th grade, if a student is injured which necessitates the student's complete withdrawal from the school or prohibits enrollment in the school for that semester, and the student does not receive any academic credit for that semester, then the semester shall not count as one of *the* consecutive semesters of enrollment.

* * *

e. All withdrawals must immediately be reported to the Association prior to the withdrawal (except in emergency

situations), and supported by written verification from a treating physician, with an unlimited license to practice medicine, and the student's principal or the principal's designee. These verifications must specify the circumstances which warrant the student's withdrawal, and the student's inability to obtain academic credit for the semester.

* * *

C–17-8
Hardship
17-8.1
General

The Commissioner or his designee or the Committee shall have the authority to set aside the effect of any Rule when, in the opinion of the Commissioner or his designee or the Committee, *all of the following conditions are met:*

a. Strict enforcement of the Rule in the particular case will not serve to accomplish the purpose of the Rule;

b. The spirit of the Rule has been violated; and

c. There exists in the particular case circumstances showing an undue hardship which would result from enforcement of the Rule.

* * *

Appendix C

17-8.4
General Consideration

a. Ordinary cases shall not be considered hardship; rather, the conditions which cause a violation of a Rule, a disregard of a decision or directive made under these Rules, or the failure to meet the eligibility requirements must be beyond the control of the school, the coach, the student, the parents and/or the affected party.

b. Injury, illness or accidents which cause a student to fail to meet a basic requirement are possible causes for a hardship consideration.

c. Likewise, a change in financial condition of the student or a student's family may be considered a hardship, however, such conditions or changes in conditions must be permanent, substantial and significantly beyond the control of the student or the student's family.

* * * *